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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RICKY BENJAMIN, Defendant and Appellant.	2d Crim. No. B211183 (Super. Ct. No. BA243260) (Los Angeles County)

Ricky Jamal Benjamin appeals from the judgment entered following his conviction by a jury of first degree murder (Pen. Code, §§ 187, subd. (a), 189)[1] and attempted second degree robbery. (§§ 664, 211, 212.5.) The jury found true an allegation that appellant had personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The jury also found true a special circumstances allegation that the murder had been committed while appellant was engaged in the attempted commission of robbery. (§ 190.2, subd. (a)(17(A).) Appellant was sentenced to prison for life without the possibility of parole plus a consecutive term of 25 years to life for the firearm allegation.

Appellant contends: (1) the evidence is insufficient to identify him as the person who shot the victim; (2) defense counsel was ineffective because he failed to move to suppress the identification of him by an eyewitness to the murder; (3) the trial court

[1] All statutory references are to the Penal Code.

prejudicially erred in failing to instruct sua sponte on consciousness of guilt; and (4) he was denied his Sixth Amendment right to confront the analysts who had prepared reports concerning DNA evidence. We affirm.

Facts

Angelica Maldonado (Angelica) was the sister of the victim, Daniel Maldonado (Daniel). On May 18, 2002, she was 11 years old. On that date at about 6:00 p.m., she saw Daniel drive his car up the driveway of their home. It was still light outside. The windows of Daniel's car were closed, but the sunroof was open.

Two African-American men approached the car. One came to the driver's side window and pointed a gun at Daniel. The other got on top of the car and pointed a gun through the open sunroof. The man by the driver's window was wearing a hood and a ski mask that completely covered his face. The man on top of the car was also wearing a hood. Underneath the hood was a baseball cap. The baseball cap was "pulled down to cover his eyes."

Angelica got a telephone, jogged to the middle of the driveway, and dialed 911. She heard a gunshot and saw the men run away. Angelica assumed that the man with the baseball cap had shot Daniel through the open sunroof because the driver's window did not have any bullet holes. The bullet entered the back of Daniel's neck and followed a downward path into the chest cavity, where it penetrated Daniel's aorta and heart.

Angelica was four to five feet away from the man with the baseball cap. At trial Angelica testified that she was able to see only his nose, lips, chin, and the bottom of his cheeks. But at the earlier preliminary hearing she had testified that she could not see his nose or lips.

At trial Angelica identified appellant as the man with the baseball cap. However, several months after the shooting, when Angelica was shown a six-person photo lineup containing a photograph of appellant, she told the police that she did not recognize the shooter. Three months later, when the police showed Angelica a second photo lineup, she identified a person named Daniel Brown as the shooter. Appellant's photograph was not included in the second photo lineup. Angelica identified appellant for the first time at

the preliminary hearing. Her identification was based primarily on the shape of appellant's chin.

The police recovered a spent cartridge casing from the rear floorboard of Daniel's car. A firearms expert opined that the "shell casing [had been] fired from a pistol of a .380-caliber semiautomatic." The characters "380 auto" had been stamped on the back of the casing. However, it was possible, although unlikely, that the casing had been fired from a 9-millimeter firearm.

Miriam Guzman lived across the street from the Maldonados. While inside her house, she heard the shot that killed Daniel. Guzman went outside and saw "a dark-skinned person" remove his hand from inside the sunroof of Daniel's car. The person then ran away. While he was running, a baseball cap fell from his head onto the grass. Guzman did not see the person's face. She "just saw his height and a wide back." She picked out appellant from a photo lineup based on his "wide-shouldered" build and skin color.

DNA testing was performed on the baseball cap that had fallen from the shooter's head. The testing showed that the cap contained a mixture of DNA from more than two persons. Appellant's DNA was the "primary source of that mixture." The likelihood that another African-American would share appellant's DNA was one in 190 quadrillion. It could not be determined whether appellant was the last person to have worn the cap.

The DNA from the cap was compared to the DNA of five other persons, including Daniel Brown, whom Angelica had identified as the shooter in the second photo lineup. These other persons "could not be definitively included or excluded as a secondary source" of the DNA obtained from the cap.

Daniel's brother, Moses Maldonado (Moses), lived with Daniel. For approximately five years, Moses had "known [appellant] from the neighborhood." A week after the shooting, Moses was driving his car when appellant waved at him. Appellant was standing on the sidewalk about five houses away from where Daniel had been shot. Moses stopped his car, and appellant asked him, "Have you found out anything?" Moses replied, "No." Appellant responded that he thought a "guy two blocks

down" with a green car had shot Daniel. Appellant said that he had two firearms - "a .380 and a .38" - and that Moses could use them whenever he wanted. Moses understood appellant's statement as meaning that he could use appellant's firearms to take revenge against the person with the green car. Moses said, "All right," and drove away.

On a later occasion, Moses was driving his car when he stopped at a stop sign about one block from his house. Appellant was walking nearby and waved at Moses. Appellant asked him, "What happened? You find out anything?" Moses replied, "No." Appellant again told Moses that he thought "that guy in the green car" had shot Daniel.

Denice White lived near Daniel's residence. During the summer of 2002, she and appellant were at a "gathering" in the neighborhood. She heard appellant brag, "I took that Ese Out." Appellant said that the event had occurred "up the streets." "Ese" is street slang for a "white boy" or "Hispanic person." "Take out" can mean "to get rid of or put an end to." (Webster's New Internat. Dict. (3d ed. 1981) p. 2332.) White knew that a "Hispanic boy" had been killed in the neighborhood in May 2002. White testified that she had been a "crack head" who had used cocaine. But she did not say that she had been under the influence of cocaine when she heard appellant's admission.

Appellant did not call any witnesses to testify on his behalf.

Discussion

I

Sufficiency of the Evidence

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Appellant contends that there was no substantial evidence to support a finding that he was the shooter because (1) Angelica's identification

testimony "was inherently improbable"; and (2) the DNA evidence did not confirm that he had worn "the hat in question on the day of the shooting, and only tended to show that he had worn the hat at some point in the past."

Even without regard to Angelica's identification of appellant as the shooter, the evidence of his guilt is substantial. Appellant frequented the victim's neighborhood and knew his brother, Moses. Guzman testified that the shooter was similar in build and skin color to appellant. During a gathering in the victim's neighborhood a few months after the shooting, White heard appellant brag about "taking out" a white or Hispanic person at a location "up the streets." On two occasions appellant told Moses that another person had shot his brother. The jury could have reasonably inferred that these statements were false and intended by appellant "to deflect suspicion from himself. [Citation.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1057.) Such false statements showed appellant's consciousness of guilt. (*Ibid*; *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669 ["When a suspect makes false statements for the purpose of misleading or warding off suspicion, though these acts are by no means conclusive of guilt, they may strengthen the inference arising from other facts"].) Furthermore, appellant made it known to Moses that he owned a .380 caliber firearm, the same caliber firearm most likely used by the shooter.

Finally, appellant was the primary contributor of the DNA found on the shooter's baseball cap. It was reasonable to infer that he was also the primary user of the cap and, therefore, had worn it at the time of the shooting. We recognize that the DNA evidence did not rule out the possibility that someone else had worn the cap at the time of the shooting. But in reviewing the sufficiency of the evidence, we are not concerned with other possible scenarios. "That the evidence could be consistent with other possible scenarios is irrelevant . . . so long as there was substantial evidence from which a rational trier of fact could have found defendant [guilty]." (*People v. Hill* (1998) 17 Cal.4th 800, 850, fn. omitted.) Moreover, the DNA evidence must not be considered in isolation. When it is considered together with all of the other relevant evidence, appellant's identity as the shooter is difficult to dispute.

II

Effective Assistance of Counsel

Appellant contends that counsel was ineffective because he failed to move to suppress Angelica's identification of him as the product of an unnecessarily suggestive identification procedure. "A due process violation occurs when a pretrial identification procedure is so impermissibly suggestive that it gives rise to a very substantial likelihood of irreparable misidentification. [Citation.]" (*People v. Carlos* (2006) 138 Cal.App.4th 907, 912.) Appellant argues that the identification procedure was iimpermissibly suggestive because, before Angelica identified appellant for the first time at the preliminary hearing, the police had told her that DNA evidence showed that "somebody named Ricky Benjamin [appellant] might have been the person wearing the baseball cap."

"The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.*, at p. 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

We need not consider whether counsel was deficient in not moving to suppress Angelica's identification of appellant. As discussed above in part I, the evidence of appellant's guilt is overwhelming even if we disregard her identification. Thus, if defense counsel had successfully moved to suppress Angelica's identification of appellant, it is

not reasonably probable that the result of the proceeding would have been different. Appellant has therefore failed to establish that counsel's alleged "deficient performance prejudiced the defense." (*Strickland v. Washington, supra,* 466 U.S. at p. 687.)

III

Instruction on Consciousness of Guilt

Appellant contends that the trial court prejudicially erred in failing to instruct sua sponte on consciousness of guilt pursuant to CALCRIM No. 362, which provides: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The trial court did not have a duty to give CALCRIM No. 362 sua sponte: "Where . . . an instruction simply informs the jury that a fact or cluster of facts is not, without more, substantial evidence of guilt under the ordinary legal rules set forth elsewhere in the instructions, we have not imposed a duty on trial courts to provide such an instruction sua sponte. For example, the instructions concerning consciousness of guilt . . . recite that such evidence is not sufficient by itself to prove guilt, yet we have never held that the trial court has a sua sponte duty to instruct the jury accordingly. [Citation.] . . . '[I]nstruction[s] [such as those concerning consciousness of guilt] that tell[] the jury what kinds of rational inferences may be drawn from the evidence' . . . are not vital to the jury's ability to analyze the evidence and therefore are not instructions that must be given to the jury even in the absence of a request." (*People v. Najera* (2008) 43 Cal.4th 1132, 1139, fns. omitted.)

In *Najera* our Supreme Court noted that, in *People v. Atwood* (1963) 223 Cal.App.2d 316, 334, the appellate court had "found that the trial court had a sua sponte duty to instruct on adoptive admissions and false statements indicating a consciousness of guilt 'under the particular evidentiary circumstances of the case' . . . ." (*People v. Najera,*

supra, 43 Cal.4th at p. 1139, fn. 3.) The Supreme Court did "not read *Atwood* as imposing a categorical duty on trial courts to instruct on these issues. [Citation.]" (*Ibid.*)[2]

In any event, even if the trial court had erred in not instructing sua sponte on consciousness of guilt, the error would have been harmless because it is not reasonably probable that appellant would have obtained a more favorable outcome had the instruction been given. (See *People v. Parson* (2008) 44 Cal.4th 332, 357-358; *People v. Atwood, supra*, 223 Cal.App.2d at p. 334.)

IV

Sixth Amendment

Based on *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __, 129 S.Ct. 2527, appellant contends that he was denied his Sixth Amendment right to confront the analysts who had prepared the reports on the DNA evidence. In *Melendez-Diaz* the United States Supreme Court concluded that affidavits reporting the results of forensic analysis are testimonial evidence. The affiants, therefore, are " 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Id*., 129 S.Ct. at p. 2530.) The Supreme Court reversed the defendant's conviction because the trial court had admitted analysts' affidavits showing that the substance seized from his person was cocaine. At trial the defendant had objected that the Confrontation Clause "required the analysts to testify in person." (*Id*., 129 S.Ct. at p. 2531.) The Supreme Court reasoned: "Absent a showing that the analysts were unavailable to testify at trial *and* that [defendant] had a prior opportunity to cross-examine them, [defendant] was entitled to be ' "confronted with" ' the analysts at trial. [Citation.]" (*Id*., 129 S.Ct. at p. 2532, fn. omitted.)

Melendez-Diaz is distinguishable. Unlike the defendant in that case, appellant did not object to the admission of the analysts' reports. Appellant's counsel told the court: "Your honor, in reviewing the exhibits, People's exhibits, I don't have any objection to them." In *Melendez-Diaz* the Supreme Court noted: "[W]hat testimony *is* introduced

[2] In *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198, *Atwood* was disapproved to the extent it held that a trial court must instruct sua sponte on adoptive admissions.

must (if the defendant objects) be introduced live." (*Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. at p. 2532, fn. 1.)

Moreover, in *Melendez-Diaz* no expert testified concerning the analysis of the substance in question. Thus, the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz v. Massachusetts*, *supra*, 129 S.Ct. at p. 2537.) Here, in contrast, an expert testified concerning the DNA testing. The expert was Jacki Higgins, who had worked at the laboratory where the testing had been performed: the Orchid Cellmark laboratory in Germantown, Maryland. At the time of the testing, Higgins was "a DNA Analyst IV and the training coordinator for the laboratory." Higgins reviewed the three reports received in evidence and "all of the material and the notes that were generated for this case" by Cellmark. She opined that the DNA "data was generated, and the reports were created according to the standard operating procedures that were in place for the Cellmark laboratory in Germantown." She "agree[d] with the conclusions that were generated during the time the reports were created and signed." Because appellant did not object and Higgins was subject to cross-examination, appellant's Sixth Amendment confrontation rights were not infringed.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Larry P. Fidler, Judge

Superior Court County of Los Angeles

Marilee Marshall, Jennifer M. Hansen; Marilee Marshall & Associates, for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.